Supreme Court, U.S.
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No. 10-

SUPREME COURT OF THE UNITED STATES

October Term, 2010

GEORGE ADAMS, individually and dba JMS BOTTOM OF THE FIFTH SPORTS-BAR
Petitioner,

vs,

JAMES TRIMBLE, Chief Benicia Police Department, JOHN McFADDEN, CITY OF BENICIA, DOES 1-100, inclusive,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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Questions Presented

A California statute, the so-called anti-SLAPP law, ordains a procedure by which civil defendants can obtain pretrial dismissal of lawsuits allegedly based on the defendant's "free speech ... in connection with a public issue". California courts have applied this remedy even when the speech in question is uttered by government actors in derogation of federal Civil Rights law [42 USC § 1983], and the dismissed lawsuit, itself, sought to *vindicate* First Amendment rights, including those of free expression and to petition for redress of grievances. Against this background:

1. Can the state, consistent with the federal Constitution, close its courts to federal suits alleging state-actor defendants violated a plaintiff's civil rights under the First and Fourteenth Amendments in retaliation for his exercise of them by invoking the anti-SLAPP law and its heightened protection of the *defendants'* First Amendment rights? Fairly included in this question are the subordinate questions of:

a) whether such an application of the anti-SLAPP law offends against the "Supremacy Clause" [Const. Art. VI cl. 2]?

b) whether such an application of the anti-SLAPP law offends against the First Amendment as applied to the states by the Fourteenth?

c) whether such an application of the anti-SLAPP law offends against the guarantee of Due Process in the Fourteenth Amendment?

d) whether such an application of the anti-SLAPP law offends against the Civil Rights statute, 42 USC § 1983, itself?

2. Does the anti-SLAPP law as applied create a *de facto* absolute immunity in California's courts on behalf of public officials who otherwise would be denied such immunity under this Court's decision in *Martinez v. California* 444 U.S. 277 (1980)?

3. Does the anti-SLAPP law as applied create a California "exception" to the doctrine, set out in *Garcetti v. Ceballos* 547 U.S. 410, that public employees are *not* entitled to First Amendment protection for "speech" uttered as part of their public-employment duties?

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Parties

The parties are as captioned.

Jurisdiction

The opinion of the Supreme Court of the state of California, which is that state's Court of last resort within the meaning of Rule 13(1) of this Court, denying discretionary review was entered on September 15, 2010. (App. 1) No order requesting a rehearing was sought. This petition is therefore timely within the meaning of Rule 13(1) and (3) of this Court if mailed on or before December 14, 2010.

As specified below, the opinion of the Court of Appeal of California (App. 2) the order denying review and the "questions presented" in the state Supreme Court review petition (App. 3) fairly raise, explicitly and by implication, the questions presented in this instant petition. Those questions implicate the constitutionality under the federal constitution of California's "anti-SLAPP" statute [California Code of Civil Procedure §§ 425.16], set out *in haec verba* below. Petitioner asserts that this may affect the public interests of the citizens of California and of the United States generally. The Respondents named as parties hereto are local public entities and officers thereof, but none is facially an employee of the state of California. As such, pursuant to Rule 29(4)(c) of this Court, Petitioner advises that 28 USC § 2403(b) may apply, and service of this petition has therefore been made on the Attorney General of California with the understanding that this Court might

invite the Attorney General to intervene as if a party.

Petitioner believes that in light of his constitutional challenge as facially alleged and as specified in the above paragraphs, jurisdiction is with this Court pursuant to 28 USC § 1257(a).

Opinions Below

The order of the California Supreme Court denying discretionary review, from which *certiorari* is sought, is annexed as App. 1. The opinion of the California appellate court discussing the issues Petitioner brought before California's Supreme Court is annexed as App. 2. A list of "questions presented" to the California Supreme Court is annexed as App. 3. All are unpublished.

Statutes and Constitutional Provisions

1. In material part 42 USC § 1983 provides as follows: "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a

declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

2. California Code of Civil Procedure § 425.16, provides that:

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly;

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that

determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. ...

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the

constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) ...

3. Art. VI, Clause 2 of the Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

Laws of any State to the Contrary notwithstanding."

4. The First Amendment to the Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

5. The Fourteenth Amendment to the Constitution provides, in material part, that: "[Section I]: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." .... [Section 5] The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Statement

1. Petitioner filed a civil rights lawsuit pursuant to 42 USC § 1983 alleging *inter alia* that defendants – a Police Department, its chartering City and its named employees – harassed him, disparaged his business, and chilled his right to petition for redress against the foregoing violations. Most of the suit was summarily dismissed on

Respondents' motion in the state trial court, and, in addition to affirming the trial court's order, the California Court of Appeal ordered the balance of the complaint dismissed as well, a ruling allowed to stand by the California Supreme Court which declined to review it[1]. The dismissal was based on

[1] As is usual in such cases, the order denying review was silent with respect to the court's reasoning. This may allow Respondents to make a procedural claim against this petition. The claim is without merit, but it is appropriate that Petitioner address and dispose of it here. In their "Answer to [the] Petition for Review" [Cal. Supreme Ct. S184748, Dkt. ent. Aug. 13, 2010 at http://appellatecases .courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1950071&doc_no=S184748] at p. 7, Respondents argued *inter alia* that Petitioner failed to satisfy a "mandatory statutory requirement" for seeking discretionary review. Specifically, California Rule of Court, Rule 8.504(b)(3) (analogous to Rule 14 of the Rules of this Court, although Rule 14 does not appear to have a correlate provision) requires that "[i]f a petition for rehearing could have been filed in the Court of Appeal, the petition for review must state whether it was filed and, of so, how the court ruled" but Petitioner's Supreme Court pleading was silent on this issue. Respondent arguably may contend that Rule 8.504(b)(3) was a "state law ground that is independent of the federal question and adequate to support the judgment" [*Coleman v. Thompson* 501 U.S. 722, 729 (1991)] which therefore precludes this Court's review of the California Supreme Court's order. The solution-presumption which most often rebuts such an argument – that the California appellate opinion, the "one reasoned state judgment" [*Ylst v. Nunnemaker* 501 U.S. 797, 803 (1991)] dealing with Petitioner's Federal claims addressed them on their merits – is unavailing because Rule 8.504(b)(3), which applies only at the level of California Supreme Court review, would not have been relevant at the time of the appellate decision. But there are other reasons for rejecting Respondent's "independent

California's so-called "anti-SLAPP" law, which allows defendants to contest, on the pleadings, lawsuits occasioned by "any act of ... [the defendant] in furtherance of ... [his or her] right of petition or free speech ... in connection with a public issue" [California Code of Civil Procedure § 425.16(b)(1)]. (App. 1). This petition follows. In it, Petitioner urges that invocation of the "anti-SLAPP" statutes by public officials alleged in state-forum § 1983 lawsuits brought to *vindicate* the speech and redress clauses of the First Amendment offends against (1) § 1983 itself; (2) the Supremacy

state grounds" argument, if made. First, it is clear that Rule 8.504(b)(3) although of statutory force as are all of California's Court rules, is a directory technicality of pleading rather than a jurisdictional requirement for a state high Court review [*cf.*, e.g., *In re Richard S.* 819 P.2nd 843, 848 (Cal. 1991) (state rule-ordained procedure for conferring decision-making jurisdiction in temporary judge is not "jurisdictional" in the fundamental sense, but rather directory in nature]. Second, it is not clear that a pleading error under Rule 8.504(b)(3) has barred California Supreme Court review in *any* case (a LEXIS search, extending to orders by the California Supreme Court granting or denying review, reveals no cases decided on either the basis of that Rule or on its predecessor), and it certainly does not appear to be the sort of *universally-applied* practice which comprises an "independent state ground" under the jurisprudence of this Court [e.g., *James v. Kentucky* 466 U.S. 341, 348-351 (1984); *Ford v. Georgia* 498 U.S. 411, 423-424 (1990)]. Third, circumstantial evidence suggests that the omission of a Rule 8.504(b)(3) recital in Petitioner's state Court review pleading was of negligible impact, since the docket *op.. cit.* reflects that the California high Court examined the record, thereby satisfying for itself any lingering curiosity over the question of a rehearing petition, before it ruled.

Clause; (3) the First Amendment as implemented by the Fourteenth; and (4) the right of citizen-access to state forums for enforcement of federal rights. Petitioner also argues that the anti-SLAPP statute *de facto* creates an absolute immunity for state officials which verges on totalitarian and is, at any rate, contrary to the jurisprudence of this Court. Petitioner believes that the case raises fundamental questions about how constitutional provisions framed to shield individuals from abuses of state power can be turned around to shield the state from an effort by one individual to seek redress from such abuses.

2. Petitioner is "owner and operator of JMS Bottom of the Fifth Sports Bar" [App. 2 at 3] in the City of Benicia, California. Respondent Trimble was at relevant times Benicia's Police Chief, and co-Respondent McFadden one of the Department's patrol officers [*Id.* at 2-4]. In a complaint[2] against Trimble, McFadden, the Department and the City[3] brought in California's trial court of general jurisdiction Petitioner claimed that from January, 2004 through June, 2005, Respondents "'engaged in a continuous pattern of unlawful verbal abuse and harassment of the patrons of [JMS] by, among other things, unlawfully detaining patrons leaving

[2] Actually, a first *amended* complaint. All references in this instant petition to the "complaint" are in fact to its "first amended" version.

[3] As is California custom, Petitioner also filed against unspecified "Doe" defendants (inferentially other police officers) with a right to designate them later in the proceedings.

the establishment, engaging in needless and excessive administrative inspections ,and making unfounded and defamatory complaints to the California Alcoholic Beverage Control (ABC)'" Department[4]. [*Id.* at 3-4]. Petitioner hired counsel, who wrote the ABC to dispute the allegations, and hired an investigator who authored reports refuting them. The lawyer sent copies of both the letter and the reports to Trimble and a Deputy Chief, requested and obtained two face-to-face meetings with Trimble, and met with a City Council member about the alleged harassment[5] [*Id.* at 4]. These measures failed to resolve matters. Petitioner then tried to abandon-and-sell the business, but Respondents frustrated the process: after a purchaser was found, Trimble wrote the ABC advising it (and, constructively, the purchaser) that

[4] The ABC "is the Governmental organization responsible for administration and enforcement of the liquor laws throughout the state, including licensing" [Dkt. Ct. App. Cse. A121318 (http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=1367217&doc_no=A121318) D/E 08/07/2008 "Defendants/ Appellants/Cross-Respondents' Op. App. Br. on Partial Appeal of Order on Anti-SLAPP Motion" at p. 9, citing Tr. Ct. Cse. FCS030447 Req. for Judicial Notice at R. "C.T. 62:2-15 & 193-195 Ex. "B" and California Business and Professions Code § 232049 *et. seq.*]. In their appellate Court brief, Respondents noted that the ABC had made administrative findings against Petitioner both before and after the timeframe of his instant lawsuit [Op. Br. *op. cit.* at 9]. The Court of Appeal refused to take judicial notice of these matters [App. 2 at 24 n. 8], and they therefore do not dilute or contaminate Petitioner's claim.

[5] In addition, Petitioner personally emailed Trimble complaining of intrusive patrol activities near his premises.

Trimble, acting as police Chief, intended to impose and enforce significant limitations on the bar's hours of business. The purchaser withdrew from the sales contract [*Id.* at 4-5].

3. Petitioner sued the Respondents. Three of his theories articulated theories for relief under 42 USC § 1983: (a) deprivation of "clearly established constitutional rights", (b) conspiracy to violate his civil rights, and (c) liability of the City for having ratified and made-into-policy the acts of the individual officers under a *Monell* [*Monell v. Department of Social Services* 436 U.S. 658 (1986)] theory[6] [7]. Generally, Respondents prevailed, although portions of several causes-of-action survived. Both sides appealed, and in an opinion issued on June 18, 2010 (App. 2), the Court of Appeal ordered dismissal of the entire action.

[6] *Monell* presents its own complex jurisprudence in many cases since public entities often attempt to dissociate from the conduct of individual defendants. That did not occur here, at least at the pleading stage, and Respondents repeatedly portrayed Trimble's conduct as justifiable in terms of governmental policy.

[7] Plaintiff also pleaded additional state tort theories, specifically interference by Respondents with his contract to sell the bar, interference with his "economic advantage", and negligence [App 2 at 7]. These theories are plainly not of independent constitutional dimension, but anti-SLAPP's blanket limitation on damage-recovery is for intrusion into constitutionally protected property interests, as secured by such tort theories, is itself, unconstitutional. That said, much of this petition will focus on the § 1983 theories, since the constitutional objection to dismissal of such theories is most obvious.

Petitioner's petition for discretionary review was denied on September 15, 2010 (App. 1), and this petition follows.

4. (a) Respondents prevailed under California's "anti-SLAPP" law. "SLAPP" is an acronym for "strategic lawsuit against public participation" [Oring & Canan *SLAPPs: Getting Sued for Speaking Out* (Philadelphia, Temple University Press, 1996) pp. 8-9]. The original concept behind the law was to limit "strategic" suits filed in retaliation for exercise by *non-governmental entities of their rights under the "Petition Clause"* of the First Amendment [*Id.* at 8]. As one commentator explained [Martin, *The Republican* 15-21 (August 1997, pp. 17-18)], "[s]ince the 1970's, thousands of US citizens have been sued for activities that most of us take for granted ... letter to government agencies about pollution ... their children's teachers ... sexual harassment .... A SLAPP essentially takes a political or social issue in which the focus is on the behavior of a company or individual and transforms it into a private legal issue ...", utilizing "meritless suits aimed at silencing a plaintiff's opponents or at least in diverting their resources" [*Hamilton v. Prewett* 860 N.E.2nd 1234, 1241-1242 (Ind. App. 2007)].

(b) A number of states enacted "anti-SLAPP" statutes[8] in response to these and similar

[8]Az. Rev. Stats. Ann. §§ 12-751 – 12-752; Ark. Code Ann. §§ 16-63-501 – 16-63-508; Del. Code Ann. T. 10 §§ 8136-8138, Fla. Stat. §§ 768.295-520.304(4), Ga. Code Ann. § 9-11 - 11.1, Haw. Rev. Stat. v. 13 §§ 634F-1 – 634F-4, 735 Ill. Comp. Stat. 110/1, 110/5, 110/10, 110/15, 110/20, 110/25, 110/30, 110/35,

commentaries. It would appear that either by explicitly codifying their "anti-SLAPP" statutes to apply only to *citizen* speech [e.g., Mass. G.L. c. 231 § 59H ¶ 6; 6, Wn. Rev. Code § 4.24.510[9]] or by jurisprudential practice[10], all states but one

110/99, Ind. Code §§ 34-7-7-1 – 34-7-7-10, La Code Civ. Proc. Ann. Art 971, Md. Code Ann. 5-807, Mass. Gen. Laws Ann. Ch. 231 § 59H, Minn. Stat. §§ 554.01 – 554.05, Mo. Rev. Stat. § 537-528.1-7, Nev. Rev. Stat. §§ 25-21,241 – 25-21,246, NB. Rev. Stat. §§ 41.635 – 41.670, NM Stat. Ann. §§ 38-2-9.1 – 38-2-9.2, NY CPLR 3211(g), 3212(h), Ok. Stat. T. 12 ch. 25 § 1443.1, ORS §§ 31.150 – 31.155, 27 Pa. Cons. Stat. §§ 707-7708, 8301-8305, RI Gen. Laws §§ 9-33-1, 9-33-4, 45-24-67, Tenn. Code Ann. §§ 4-21-1—1 – 4-21-1—4, Ut. Code Ann. §§ 78B-6.1401 – 89B.6-1405, Wn. Rev. Code § 4.24.520.

[9] In *Kobrin v. Gastfriend* 821 N.E.2nd 60, 64, 65 (Mass. 2005), the Court construed "the phrase 'based on said party's exercise of its right of petition under the constitution' as restricting the statute's coverage to those defendants who petition the government on their own behalf. In other words, the statute is designed to protect overtures to the government by parties petitioning in their status as citizens. It is not intended to apply to those performing services for the government as contractors. ... The right of petition contemplated by the Legislature is thus one in which the party seeks some redress from the government ... 'a formal written *request* addressed to an official person or organized body; and ... 'a formal written request addressed to a magistrate or court *praying for ... relief*' [citation omitted] (emph. In orig.)." *Segaline v. Dept. of Labor & Indus.*, 238 P.3rd 1107, 1110 (Wn. 2010), the Court held that government entities are not "persons" for purposes of "anti-SLAPP" protection]

[10] A good-faith all-state longitudinal. review by counsel of all "anti-SLAPP" decisions outside of California reveals no case sustaining use of the "anti-SLAPP" remedy by a government actor alleging that a citizen-petitioner was burdening the

enacted legislation which hewed to the laudable goals of the "anti-SLAPP" movement. California is the exception. While its "anti-SLAPP" statute is generically worded "to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights" [*Rusheen v Cohen* 128 P.3rd 713, 717 (Cal. 2006)], California has deviated both from the stated goal and the national norm of "anti-SLAPP" legislation by a series of court decisions which interpret California's statute to burden citizens who exercise their constitutional right to speak and petition against the government. This outcome is achieved by reposing the speech right not in the petitioners,

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government-actor's speech by his petition. Indeed, other than as a forum at which citizen speech-and-petition occurs, the government barely figures at all in the "anti-SLAPP" jurisprudence; when the government plays a role, it is typically for its collateral involvement in other people's lawsuits [e.g., *Knightstown Banner, LLC v. Town of Knightstown* 882 N.E.2nd 270 (Ind. App. 2008) (in dispute between primary litigants over whether town records are discoverable, town is sued, and seeks attorney's fees but later withdraws its claim); *Lee v. Pennington* 830 S.2nd 1037 (La. 2002) (police department not liable for passive "tort" of making-available an allegedly defamatory police report to the press)]. This is not to say that a government official cannot be burdened with a "SLAPP" suit, but there appear to be no cases which are not readily distinguished from the instant one. In *Schelling v. Lindell* 942 A.2nd 1226 (Me. 2008) a state legislator successfully moved to dismiss a defamation suit for a letter he wrote to a newspaper on an issue of public interest, *i.e.* he was burdened simply for being a citizen who spoke out in a public forum, a very different matter from the job-related conduct in the wake of Petitioner's exercise of his petition-rights in which Respondents engaged at bar.

but in the government actors they sue. The trend began with *Bradbury v. Superior Court* 57 Cal. Rptr. 2nd 207 (Cal. App. 1996), in which a prosecutor invoked the "anti-SLAPP" statute against a deputy sheriff from a neighboring county who sued for defamation after the prosecutor publicly criticized the deputy's conduct in securing a search warrant which was later executed with fatal results. Reasoning that government entities qualify as "persons" for liability, civil rights and free speech purposes [*Id.* at 211 & n. 2, citing *Monell v. New York City Dept. of Social Services* 436 U.S. 658, 690 (1973); *Nadel v. Regents of Univ. of California* 34 Cal. Rptr. 2nd 188 (Cal. 1994), *cert. den.* 516 U.S. 1028 (1995) (government may invoke *New York Times v. Sullivan* 376 U.S. 254 (1964) burden-shifting when sued for defamation by public-figure citizen-plaintiffs); *Nizam-Aldine v. City of Oakland* 54 Cal. Rptr. 2nd 781 (Cal. App. 1996) (city need not prove truth of allegedly libelous statements of its employees in defamation action)], the *Bradbury* court held that the "anti-SLAPP" remedies properly applied. *Bradbury* involved traditional speech regarding a public controversy which happened to be uttered by a speaker who worked for the government. However, subsequent cases have extended its doctrine to allow public entities and employees to "SLAPP"-down lawsuits brought against them by citizens who seek to use the courts to petition for their own rights. Thus, the "anti-SLAPP" statute has been invoked to obtain dismissal of § 1983 actions [e.g., *Vergos v. McNeal* 53 Cal. Rptr. 3rd 647 (Cal. App.

2007) ("anti-SLAPP" remedy invoked by hearing officer sued for denying a sexual harassment claim); *Vargas v. City of Salinas* 205 P.3rd 207 (Cal. 2009) (advocacy group's suit against allegedly improper government agency sponsorship of ballot initiative); *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara Association of Governments* 84 Cal. Rptr. 3rd 714 (Cal. App. 2008) (same)]. In *Briggs v. Eden Council for Hope & Opportunity* 969 P.2nd 564, 570, 574-575 (Cal. 1999), the California Supreme Court held that the "anti-SLAPP" statute applies whenever statements are made "in connection with an issue under consideration ... in official proceedings or in connection with an issue being reviewed by an official proceeding[11]". It was this last formulation in synergy with the public-employee-speaker cases on which Respondents and the Courts below [*see*, App. 2 at 10] primarily relied[12].

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[11] *Briggs* did not involve a public entity defendant. The gravamen of the case is that defendant *Eden Council*, apparently a non-profit low-income tenant advocacy group, made derogatory statements about the Briggs, landlords, when assisting the tenants in complaining about them to regulatory agencies.

[12] California moderated its "anti SLAPP" law with the passage in 2003 of Code of Civil Procedure § 425.17, which exempts from its sweep suits alleging business-fraud or brought *entirely* [*Club Members for an Honest Election v. Sierra Club* 196 P.3rd 1094 (Cal. 2008)] in the public interest seeking relief which can only be obtained by private means against defendants not engaged in professional speech (such as publishing or drama) or who are not non-profit organizations supported largely by government grants.

(c) Specifically, the Court of Appeal held that Respondents were entitled to "anti-SLAPP" relief because the core event recited in the complaint was Trimble's letter "to the ABC, a governmental body, in response to the ABC's notice of a proposed change of ownership of JSM's liquor license." (App. 2 at 10) "Because the letter was a 'writing made in connection with an issue under consideration' by a governmental body" [*Id.* at 11] within the meaning of California's "anti-SLAPP" statute, California Code of Civil Procedure § 425.16(e)(2) [*see,* this petition *ante.* at 4-5] as construed in *Briggs*, "the trial court properly determined the anti-SLAPP statute applied to allegations in [Petitioner's § 1983 claims and his negligence action]" [App. 2 at 11] as they related to Trimble's letter and "any verbal communications and complaints (as pleaded in the civil rights action [*see,* this petition *ante.* at 9-10; App. 2 at 12-13]) by [Respondents] to the ABC" [App. 2 at 11]. Moreover, under California law, "an anti-SLAPP motion challenges a *cause of action* rather than individual allegations or theories supporting the cause of action" [*Id.*] Here, ruled the appellate court, Respondents' "communication with the ABC constitute the gravamen of each of the causes of action" [*Id.* at 12]. The individual instances of alleged police harassment of patrons "only explain" [*Id.*] the sequence of events leading up to the letter, which in turn was the pivotal event in causing the bar's purchaser to walk away from the sale [*Id.*] In turn, the letter was the culmination of escalating friction between the parties, leading Petitioner to voice his complaints and Respondents

to retaliate [*Id.* at 13; *see,* this petition *ante.* at 11-12] – all of it pivoting on Respondents' alleged defamatory communications to the ABC [App. 2 at 12-15]. As such, any freestanding allegations of misconduct embedded in the complaint were themselves subject to the logic of the "anti-SLAPP" ruling. Having framed the issues in the foregoing fashion, the outcome for Petitioner's lawsuit was ordained. After the court found for Respondents on the speech-related issues – under the "anti-SLAPP" statute no burden is imposed on defendants once they make a "*prima facie*" showing of protected speech - it fell on Petitioner affirmatively to demonstrate with *admissible* evidence a *probability* of prevailing on the factual merits of the lawsuit. Only by making such a showing could Petitioner rebut the presumption, which followed from the "speech" finding, that the lawsuit was *intended* to chill protected speech [*Id.* at 8; *see,* California Code of Civil Procedure § 425.16(b)(1) (in this petition *ante.* at 4); *see,* also, discuss. in *Fox Searchlight Pictures, Inc.* v. *Paladino* 106 Cal. Rptr. 2nd 906, 917-918 (Cal. App. 2001)]. This, Petitioner was unable to do [*Id.* at 19-29] – not a surprising outcome, given that "anti-SLAPP" motions are, under the statute, plead early in the case, often before the plaintiff has had opportunity to amass the "competent and admissible evidence" [App. 2 at 8; *Gilbert v. Sykes* 53 Cal. Rptr. 3rd 752, 763 (Cal. App. 2007)] required to make the requisite showing[13]. Petitioner had already conceded the

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[13] For example, Petitioner's cause of action for *conspiracy* to

remaining counts (numbers four through six) of his complaint [*Id.* at 3 n. 2], leaving the court with little to do other than dismiss the action in its entirety and remand for a calculation of such attorneys fees as are entitled under the "anti-SLAPP" statute [*Id.* at 30].

5. In making its ruling, the court rejected a number of Petitioner's arguments, which now form the gravamen of his recourse to this Court.

(a) It is clear that a major, if not entire, premise for Petitioner's civil rights claims as well as his ancillary state-law damage claims is that what the California courts characterized as Respondent's "protected speech", the core instance of which was Trimble's restrictions-letter to the ABC which derailed Petitioner's attempt to sell his business, was subsequent to, and retaliatory against, Petitioner's protests to the ABC and other public officials against what Petitioner viewed as a pattern of harassment against his patrons and false

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violate civil rights failed because no evidence had yet been developed beyond the allegation stage that Trimble, McFadden and others had actually reached an agreement [App. 2 at 26] and Petitioner's *Monell* claim failed for the same reasons: other than averments from his attorney, Petitioner had not yet shown a pattern or practice of patron-harassment by the Respondents, nor "indifference" to it on part of the Department or City [*Id.* at 27]. The Court had already addressed the theory underlying Petitioner's first § 1983 claim for retaliation against his exercise of civil rights by holding that what in fact was involved was Trimble's protected speech [*Id.* at 23-24]; as for deprivation of "property", the court concluded that Petitioner had failed to show his bar sale contract was a "protected" interest [*Id.* at 24-25].

regulatory complaints against him. (*See,* gen. App. 2 at 4-5) Petitioner premised his claims on a theory that his complaints to officials against Respondents' conduct were protected First Amendment petition activities. "In his first cause of action" [*Id.* at 12], Petitioner alleged that this "'violated his right to be free from retaliation for the lawful exercise of [his] right to petition governmental officials for redress of grievances'" [*Id.*]. The state court rejected this claim on a finding that Trimble's speech right allowed him to prevail over Petitioner's redress right via "anti-SLAPP" procedures [*Id.* at 12-13]. Petitioner rearticulated his arguments in his review petition below [*see,* Record Ca. S.C. S184748 Pet. Rev.at 11-15, 18, *cf.,* 28-29], and therefore is permitted to make them to this Court.

(b) Moreover, although Petitioner did not explicitly formulate the point, it is axiomatic that his lawsuit, at least insofar as it was brought to vindicate his civil rights including his petition right, was *itself* "petition" activity under the First Amendment [*see,* e.g., *California Transport v. Trucking Unlimited* 404 U.S. 508, 510 (1972); *N.A.A.C.P. v. Button* 371 U.S. 415, 430 (1963) ("litigation may well be the sole practicable avenue open to a minority to petition for redress"); *Kobrin v. Gastfriend* 821 N.E.2nd 60, 65 (Mass. 2008) ("right to petition" includes "'a formal written request addressed to a magistrate or court praying for ... relief [citing Webster's Third New Int'l Dictionary at 1690 (1993)"]. Both this Court [e.g. *United Transportation Union v. State Bar of*

Michigan 401 U.S. 576 (1971); *Button, supra,* 371 U.S. at 429] and California's Supreme Court [*City of Long Beach v. Bozek* 645 P.2nd 137 (1982), vac. 459 U.S. 1095 and reinstated 661 P.2nd 1072 (Cal. 1983)] recognize the initiation of litigation as part of the petition right, and it would appear that litigation against the *government* occupies a hierarchically preferred position in that regard over lawsuits between private parties [e.g., *Bozek, supra,* 645 P.2nd at 533-534; *see,* Andre, *California Code of Civil Procedure Section 425.16 – An Epitaph to the Right to Petition Government for Redress of Grievances* 31 Whittier L. Rev. 155, 174 ("[a] suit against a public agency is not merely a judicial petition but actually comprises *both* [judicial and traditional redress] petitions developed in the common law [and hence is] ... deserving of the greatest constitutional protection.")]. Against this background, invocation by Respondents of the "anti-SLAPP" remedy not only burdened Petitioner's substantive claim for vindication of his petition right as exercised prior to the lawsuit, but *procedurally* burdened his right to petition via the lawsuit itself. Since this latter argument is implicit in petitioner's primary petition-right argument, it is submitted that the appellate opinion necessarily rejected it, as well. Petitioner will articulate his claim at bar.

(c) The appellate court also rejected Petitioner's argument that whatever its merits, the doctrine in *Bradbury* and progeny affording "anti-SLAPP" protection to individuals acting in the capacity of public officials was superseded by this

Court's decision in *Garcetti v. Ceballos* 547 U.S. 410, 421 (2005), which held *inter alia* that "when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Focusing on the last three words in the foregoing sentence rather than on the constitutional predicate for this Court's analysis, the appellate court interpreted *Garcetti* as applying exclusively to employee-supervision. In his review petition below, Petitioner argued that the appellate court's construction of *Garcetti* was unduly narrow, and that the correct statement of the law is that *Garcetti* superseded cases such as *Bradbury*, if such cases were ever valid in the first place. (Record Ca. S.C. S184748 Pet. Rev., *op. cit.* at 5-9) Petitioner renews that claim at bar.

(d) The appellate court rejected petitioner's argument that the "anti-SLAPP" statute *de facto* vested the individual Respondents with unqualified immunity in contravention of this Court's decision in *Martinez v. California* 444 U.S. 277 (1999) – a decision which must apply in California's courts because however merely "procedural" and California-specific the "anti-SLAPP" remedy, questions of immunity in § 1983 actions are governed by federal, not state law [*Howlett v. Rose* 496 U.S. 356 (1999)]. The appellate court countered that the "anti-SLAPP" statute "is not an immunity statute, but a procedural one that allows for early dismissal of meritless claims, including federal

claims, that are based on protected activity" [App. 2 at 16]. Petitioner pressed his issue in his review petition [Record Ca. S.C. S184748 Pet. Rev., *op. cit.* at 19-20, 23-31], and he renews his claim in this Court.

Reasons for Granting *Certiorari*

Introduction

"Anti-SLAPP" statutes are a laudable procedural device for protecting freedom of speech. However, in recent years, one state, California, has turned what was designed to be a shield for speech into a sword to be used against it. The sword thereby created is to be drawn under a perverse circumstance: when a citizen tries to speak against the *government*, precisely the occasion on which the First Amendment most obviously should apply. And in *this* case, the sword has been drawn in the most perverse context of all – to penalize a citizen for using his speech-and-petition right to file a lawsuit which, itself, seeks to vindicate the citizen's right to have spoken against the government and its employees in the past.

One would hope this is a unique case, even a *sua generis* one, but it possibly is not: California is a huge, influential state has long been the source of trends, including jurisprudential ones. There is every reason to fear that the trend embodied in this case will spread. Many states have "anti-SLAPP" statutes, and *all* states, particularly at present, are in dire economic straits. Government attorneys would have every incentive to reduce losses from lawsuits to the extent possible, and the doctrine challenged here has a superficial plausibility which might, if it is not challenged, allow them to invoke that doctrine successfully. Other factors – the ongoing expansion of government, the increasing

complexity of regulation, and the volatility which so often finds its way to court – all suggest the prospect is not as unlikely as one might wish. In short, this is an important case – important in its principles and important in its potential.

Petitioner therefore prays that this Court issue a writ of *certiorari* to review what he submits are genuinely important issues.

I) This Court Should Determine Whether California's "anti-SLAPP" Statute Effectively Closes State Courts to Federal Civil Rights Claims, Thereby Burdening Citizen First and Fourteenth Amendment Assertions by Preferring Parallel Assertions Made by Government Employees.

The Fourteenth Amendment established the form of federalism which thrives to this day: all persons are citizens both of the nation and of their state, and core rights of national citizenship, including the First Amendment right to free speech and petition therefore are common to both jurisdictions [*Cantwell v. Conn.* 310 U.S. 296, 303 (1940); *cf.,* gen., *McDonald v. City of Chicago* 130 S.Ct. 3020 (2010)]. The right to sue for deprivation of constitutional rights by persons acting under color of law, 42 USC § 1983, promulgated contemporaneously with the Amendment as a primary mechanism for its enforcement [*Lynch v. Household Finance Corp* 405 U.S. 538, 545 (1972)] applies *inter alia* "against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their

authority or misuse it" [*Hafer v. Melo* 502 U.S. 21, 28 (1991) (citations omitted)].

The statute, on its face establishes concurrent jurisdiction in both state and federal courts for such enforcement actions [*Haywood v. Drown* 129 S.Ct. 2108, 2111-2112 (2009); *Howlett v. Rose* 496 U.S. 356, 358-358 (1999)].

Concurrent state and federal jurisdiction over § 1983 actions is part of a general presumption of concurrency in the judicial system generally, a presumption which predates ratification of the Constitution itself; In *Federalist* No. 82, Hamilton wrote that he presumed that "State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited", and recently, this Court observed that it "has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures" [*Haywood, supra,* 129 S.Ct. at 2114]. Whatever general reason the founders had for presuming concurrent jurisdiction, there are many reasons why today's § 1983 plaintiff might prefer a local state court as the forum for his lawsuit against public officials. County venues are generically smaller than are federal districts, and citizens of a county – particularly of the county venue at issue in the present case[14] – might be expected to have more

[14] The Census Bureau [http://quickfacts.census.gov/qfd/states /06/06095.htm] reports a Solano County population of just over 400,000. That number would be drowned in the Eastern District of California venue which includes Sacramento with its population of an additional 1,400,949 persons [*Id.* at

concern about local "good government" issues such as regulating misbehavior of police and some might, through personal experience or via discussion of the issue in the local press, even have developed a personal concern about such matters. A local case might also prove more convenient for counsel to litigate. Here, for example, Petitioner's trial counsel maintained offices in the county. Such convenience benefits might apply as well to Petitioner and his prospective witnesses. But the framers of the Constitution, the Fourteenth Amendment to it, and § 1983 never expected that these advantages could only be obtained by surrendering the substantive rights that a § 1983 lawsuit, state *or* federal, is brought to enforce. Even if a suit brought under it is entertained in a state forum, the Supremacy Clause of the Constitution [Art VI cl. 2] commands that *federal* law must govern all substantive questions including such matters as "elements, offenses and immunity" [*Howlett, supra,* 496 U.S. at 375] and the state may not, by virtue of statutes attempting to short-circuit meritless or "vexatious" [*Haywood, supra,* 129 S.Ct. at 2113] claims, bar such claims from their courts [*Id.* at 2115]. The state may establish procedural formalities relating to discovery and may even set a local limitations period for bringing the action [*Wilson v. Garcia* 471 U.S. 261, 279-280 (1985)], but

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060607]. Solano's demographic is also both slightly more affluent and significantly more racially diverse than is California's as a whole, which might be perceived as advantageous to counsel representing a business owner in a suit against the police.

§ 1983 remains "a uniquely federal remedy against incursions" [*Mitchum v. Foster* 407 U.S. 225, 239 (1972)] "to be accorded 'a sweep as broad as its language'" [*Felder v. Casey* 487 U.S. 131, 139, citing *United States v. Price* 383 U.S. 787, 801 (1966)]. A state therefore may not adopt a procedural device which "will frequently and predictably produce different outcomes in federal civil rights litigation" [*Id.*; *Haywood, supra*] contingent exclusively on whether the litigation takes place in a state or federal forum. Perhaps even more important, since the aim of § 1983 is to allow citizens to recover from governmental actors who infringe on their constitutional rights, the states may not impose "a substantive burden ... only upon those who seek redress [under the statute] for injuries resulting from misuse of governmental authority" [*Felder, supra,* 487 U.S. at 141] in contravention of the very purpose of the § 1983 which is to establish governmental liability for civil rights violations. Petitioner had both right and reason to seek his remedy in a local state court and a constitutional expectation that his reception there would be equivalent to that he would have received in an alternative federal forum.

Regrettably, Petitioner lost his § 1983 lawsuit *because* he selected a local state forum. As a result, he was subjected to California's "anti-SLAPP" procedure, which imposed a dual burden on him. The burden has been elaborated in the "statement" section of this petition and need not be repeated at length here. In essence, the "anti-SLAPP" statute afforded Respondents a potent maneuver which,

although ostensibly "procedural", functioned very much as a substantive defense. Even in terms of mere "procedure", moreover, the "anti-SLAPP" statute significantly diminished Petitioner's chances for success. Once the finding was made that Petitioner's claims ostensibly burdened Respondent's "speech", the only way Petitioner could salvage his lawsuit was to present proofs by competent and admissible evidence of a "probability" that his action could succeed on its merits. Saddling a litigant with what amounts to a one-sided "summary judgment" procedure at an early point in the case, when discovery is incomplete and may well not even have begun, clearly imposed a marked disadvantage.

Respondents argued below that the "anti-SLAPP" statute does not offend against the foregoing constitutional doctrines because it is a neutral remedy which applies across the board to all "speaker" defendants in all actions; indeed, its protections appear to have been extended to government actors only recently. That is not an answer to the question framed in the instant petition, which asks whether the state can appropriately invoke "anti-SLAPP" procedures in *a § 1983* action which predicates government-actor liability on government intrusion into the plaintiff's own First Amendment rights to speak and petition – indeed, to an action which, as discussed in the case-statement is *itself* a constitutionally-protected petition [*see,* "statement" *ante.* at pp. 20-21, citing *California Transport v. Trucking Unlimited* 404 U.S. 508, 510 (1972); *United Transportation Union*

v. State Bar of Michigan 401 U.S. 576 (1971); *N.A.A.C.P. v. Button* 371 U.S. 415, 430 (1963)]. The correct answer to *that* question is "no". The argument that the "anti-SLAPP" statute is of uniform application and just happens to apply to speech by government-actors facing state-venue § 1983 litigation fails in light of Respondent's own argument and the state courts' holding that the "anti-SLAPP" statute is merely "procedural". In this connection, although the intention of the statute is to guard the right to speech, the actual mechanism of the statute is to dismiss lawsuits. Petitioner had no "anti-SLAPP" remedy when Respondents allegedly tales to the ABC and ultimately seized his license, because ABC administrative hearings are not governed by the "anti-SLAPP" procedures. Respondents *were* entitled to invoke those procedures because Petitioner's only effective method for redress was the filing of his lawsuit, to which the "anti-SLAPP" remedy applied. Under California's interpretation of the "anti-SLAPP" statute, such application is virtually inevitable in the case of a police official such as Trimble, as one of the key duties of a peace officer is to file reports of crime or misfeasance, i.e. to "speak", and it is at any rate difficult to conceive how even the most vengeful, retaliatory report by Trimble to a regulatory board would not consist of words. Under the "anti-SLAPP" statute, this circular equatioin means that virtually *any* erroneous police report is protected – not on the traditional grounds of "good faith" but on the reductionist tautology that a false report remains a

report,, thereby triggering the "anti-SLAPP" remedy. That remedy did not merely burden Petitioner's suit, but warped it procedurally by triggering, on Respondent's *prima facie* "anti-SLAPP" showing, Petitioner was burdened with making a summary showing of probable victory in the lawsuit before he could even commence discovery. In *Soranno's Gasco, Inc. v. Morgan* 874 F.2nd 1310, 1315 (9th Cir. 1989), citing *Allen v. Scribner* 812 F.2nd 426, 435 (9th Cir.) amend. 828 F.2nd 1445 (9th Cir. 1987)], the court reversed summary judgment dismissals in § 1983 cases claiming First Amendment derogations by administrative officials[15] on grounds that issues such as the official's retaliatory motive were material disputes properly resolved by a jury. Although neither of these cases was a § 1983 action, the pivot for the holding in *Soranno's Gasco* was the court's recognition that "state action designed to retaliate against and chill political expression strikes at the heart of first amendment values" [*Id.* at 1314, citing *Gibson v. United States* 781 F.2nd 1334 (9th Cir. 1986)] as did the plaintiff's

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[15] As did Petitioner's case, *Sorrano's Gasco* also involved a claim of Due Process infringement on the plaintiff's business. Because his instant petition focuses on the constitutionality of the "anti-SLAPP" procedures generally, Petitioner has abandoned the technique, used in his review petition in the California Supreme Court, of addressing the § 1983 claims one cause of action at a time. If he prevails in this Court, it is assumed that the lawsuit will be reinstated in its entirety in that the "anti-SLAPP" dismissal will be reversed. At that time, the merits of his several causes of action can be litigated.

"interest in criticizing public officials" [*Id.*, citing *McKinley v. City of Eloy* 705 F.2nd 1110, 1113 (9th Cir. 1983)][16]. In this context, the special procedural burden and stigma imposed on *bona fide* plaintiffs by the "anti-SLAPP" statutes – the presumption, by virtue of the *prima facie* "speech" assertions on part of government defendants, that the plaintiffs are not acting in good faith and are required to "pre-prove" their case even before discovery – is not so much a vindication of the defendants' First Amendment rights as a chill, even a prior restraint, on the First Amendment rights of the Petitioner.

It follows that applying the "anti-SLAPP" statute to a § 1983 action seeking to vindicate a citizen's own First Amendment rights violates the Supremacy Clause of the Constitution, the First and Fourteenth Amendments to it, and § 1983 itself. California has put a chill on the use of its courts by its citizens to vindicate the most sacred of

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[16] The outcome is different when the case does not involve fundamental rights such as those arising under the First Amendment. In *Anderson v. Creighton* 483 U.S. 635, 646 n. 6, this Court held it possible (although not inevitable, since the matter was to be assessed on remand) that the question of qualified immunity for an official's discretionary *conduct* [*Harlow v. Fitzgerald* 457 U.S. 800 (1982) might be determined without prior discovery if it was shown that the official's conduct was of the sort which reasonable officials might do. Here, the courts departed from *Creighton*: Respondent's *First Amendment* claim that Petitioner's lawsuit was motivated to punish speech was resolved on summary judgment, and Respondent's *conduct* (the allegations that Respondents harassed Petitioner's customers) was held to be essentially irrelevant.

their rights. This practice must be put to an end. The petition for a writ of *certiorari* should be GRANTED.

II) This Court Should Determine Whether California's "anti-SLAPP" Law Has *De Facto* Created a "Right of Government Employee Speech" in Defiance of This Court's Decision in *Garcetti v. Ceballos*

As indicated, this case also poses two other significant questions. The first is whether the state appellate court erred in its interpretation of *Garcetti v. Ceballos* 547 U.S. 410 (2006). In *Garcetti,* a defendant, acting pursuant to his duties as a government prosecutor, authored a memorandum which, he claimed, provoked a retaliatory response from his supervisors. He filed a § 1983 action, which was dismissed summarily and this Court affirmed. The "dogma" [*Garcetti, supra,* 547 U.S. at 417; *Connick v. Myers* 461 U.S. 138, 143 (1983)] that public employees have *no* speech right "has been qualified in important respects" [*Garcetti, supra,* 547 U.S. at 417, citing *Connick, supra,* 461 U.S. at 144-145]: "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern" [*Garcetti, supra,* 547 U.S. at 417], but "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their

communications from employer discipline" [*Id.* at 421]. The courts below seized on this last clause, narrowing *Garcetti* to the field of employee-relations law. To be sure, in deciding *Garcetti*, this Court considered the importance of a right on part of employers to supervise public servants in order to instill workplace discipline [*Id.* at 422-425], but these observations are a commentary on the rigors of employment rather than on the extent of the employee's speech right. The question is not whether Mr. Ceballos, the deputy prosecutor in that case, was subject to employee discipline but whether he was immune to such discipline because the First Amendment shielded him; in this context, that the discipline imposed on Mr. Ceballos' was an internal reprimand as opposed to a § 1983 action by an aggrieved citizen (for whom, as a peace officer, Trimble *also* "worked") is of little consequence: the point is that "Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as ... investigating charges, and preparing filings" [*Id.* at 422], and hence had no First Amendment protections. Neither did Trimble or, by implication, Respondents generally.

Petitioner requests that this Court review whether the interests vested in citizens by the Fourteenth Amendment and § 1983 are of equivalent dignity to those vested in employers with respect to the extent of the First Amendment rights of public employees who violate the rights of citizens. The petition for a writ of certiorari should be GRANTED.

III) This Court Should Decide Whether California's "anti-SLAPP" Law Has *De Facto* Created an Immunity for Government and Its Employees In Contravention of This Court's Decision in *Martinez v. California*

Finally, petitioner asks that the Court review his argument that the "anti-SLAPP" law has *de facto* created an immunity for government employees in contravention of this Court's decision in *Martinez v. California* 444 U.S. 277 (1980). Petitiioner's *Martinez* claim is an offshoot of his Supremacy Clause claim, but he articulates it in a brief separate argument for purposes of clarity. It is this: the "anti-SLAPP" remedy available to Respondents acts as a *de facto* grant of immunity from § 1983 liability by virtue of a state statute. *Martinez* held that § 1983 liability cannot be immunized by state law. His primary contention remains, however, that California erred by applying the "anti-SLAPP" statute to public employees facing § 1983 liability for their acts in the course of employment. The petition should therefore be GRANTED on this issue as well.

Conclusion

By applying its "anti-SLAPP" statute to a public employee facing a § 1983 suit for infringing on a citizen's First and Fourteenth Amendment rights, California has inverted and perverted the § 1983 process. Its statute offends against those amendments, as well as the Supremacy Clause of

the Constitution and § 1983 itself. California has remade itself into a § 1983 desert for citizens aggrieved by public officials who, as part of their schemes, put their tyranny into words. This case poses important issues for the administration of civil justice, and the petition for a writ of certiorari should be GRANTED.

DATED: December 13, 2010

Respectfully Submitted:

//s// Donald Bergerson
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Certification of Word Count

I am a member of the Bar of this Court and certify pursuant to Rule 33(h) of the Rules of this Court, that this brief comports with the word-count limitations set out in Rule 33(d),(g) and that by the count in my word-processor it contains 8,898 words. I declare under penalty of perjury in the Northern District of California that this is true, and execute this on December 13, 2010

//s// Donald Bergerson

*Counsel of Record

Appendix One: Order Denying Discretionary Review

[SUPREME COURT FILED
September 15, 2010
Frederick K. Orlich, Clerk
by _____ Deputy

Court of Appeal, First Appellate District, Division Three – No A121318

S184748
IN THE SUPREME COURT OF CALIFORNIA
En Banc

GEORGE B. ADAMS, Plaintiff, Respondent and Cross-Appellant,

v.

JAMES TRIMBLE, et al., Defendants, Appellants and Cross-Respondents

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The petition for review is denied.

GEORGE
Chief Justice

Appendix 2 - Court of Appeals Opinion

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

FILED: Court of Appeal First Appellate District June 18, 2010, Diana Herbert, Clerk, by //s//__ Deputy Clerk.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

GEORGE B. ADAMS, Plaintiff, Respondent and Cross- Appellant, v. JAMES TRIMBLE, et. al., Defendants, Appellants and Cross-Respondents.	A121338 (Solano County Super. Ct. No. FCS030447

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James Trimble, Benicia Police Department, John McFadden and City of Benicia (the City) (together defendants) appeal from an order granting their special motion to strike under Code

of Civil Procedure[1] section 425.16 as to the fourth, fifth and sixth causes of action of George B. Adam's (plaintiff) first amended complaint and granting the motion only as to certain allegations contained in the remaining (first, second, third and seventh) causes of action. Plaintiff cross-appeals and contends the trial court should have denied the motion as to his first, second, third and seventh causes of action[2]

FACTUAL AND PROCEDURAL BACKGROUND

According to the first amended complaint, which is the operative complaint (the complaint), plaintiff is the owner and operator of JMS Bottom of the Fifth Sports Bar (JMS) located in the City. Trimble was the chief of police of the Benicia Police Department and McFadden was a police officer with the Benicia Police Department. Plaintiff alleged that between January 2004 and June 2005, defendants "engaged in a continuous pattern of unlawful verbal abuse and harassment of the patrons of [JMS] by, among other things, unlawfully detaining patrons leaving the establishment, engaging in needless and excessive administrative inspections, and making unfounded

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

[2] Plaintiff does not challenge the trial court's order granting the motion as to his fourth, fifth and sixth causes of action. Plaintiff makes essentially the same arguments relating to this (*sic*) first, second, third and seventh causes of action in his cross-appeal as he does in response to defendants' appeal.

and defamatory complaints to the California Alcoholic Beverage Control (ABC)." Plaintiff retained counsel to challenge the "unfounded allegations" defendants made to ABC. Counsel sent a letter to ABC disputing the allegations and hired a private investigator to conduct investigations that refuted the allegations. Counsel sent a copy of his letter to a deputy police chief, sent copies of the investigator's report to Trimble, and requested a meeting with Trimble. The parties met on April 6, 2005, and on April 25, 2005, plaintiff sent an email to Trimble "complaining about Defendant Does 1-100 constantly patrolling his establishment." On June 13, 2005, plaintiff's counsel met with a City Councilmember to complain about "the ongoing harassment" by defendants.

In November, 2005, plaintiff entered into a contract to sell JMS to You Cha Kim (Kim) for approximately $1,400,000. Upon learning of the proposed sale and the application to transfer plaintiff's liquor license to Kim, Trimble sent a letter dated May 5, 2006, to the ABC, indicating his intention to place restrictions on the operations of the business under new ownership, as follows: "We have received notice from [the ABC] that there is a change of ownership of [JMS]. Apparently Kim You Cha is applying for a person-to-person transfer for the On-Sale General Liquor License as of March 14, 2006. [¶[As Chief of Police, I am exercising my authority to place restrictions on the operation of this business under new ownership. Due to the frequent number of calls for service to this business over the last few years, I am placing the following

restrictions: [¶] The hours of alcoholic beverage service shall be Monday through Friday from 8:00 p.m. to 12:00 (midnight); [¶] Doors to the establishment will remain closed at all times unless there are patrons entering or leaving the business. [¶] All employees of the bar shall attend Responsible Beverage Training at least twice a year."[3] On or about June 9, 2006, Kim withdrew her application for transfer of the liquor license and canceled the agreement to purchase JMS.

On October 30, 2007, plaintiff, individually and doing business as JMS, Filed a complaint against Trimble, the Benicia Police Department and the City alleging the letter to the ABC "placing restrictions on the operations of the business under new ownership" caused him to "suffer[]a financial loss due to the withdrawal of the offer to purchase his business" as well as "severe emotional and mental distress, anxiety, humiliation, embarrassment, and the loss of security and dignity." He alleged three causes of action(1) interference with a contract; (2) interference with economic advantage; and (3) intentional infliction of emotional distress. He filed a first amended

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[3] The City later clarified that Trimble recommended restricting the hours of alcohol beverage service to 8:00 a.m. t midnight on Monday through Thursday, 8:00 a.m. to 2:00 a.m. on Friday, and 7:00 a.m. to 2:00 a.m on Saturday and Sunday, and 7:00 a.m. to 2:00 a.m. on "community recognized events" and holidays. According to the City, it had set up an appointment to meet with Kim to discuss Trimble's "recommended conditions," but Kim did not attend the scheduled meeting.

complaint on December18, 2007, adding McFadden as a defendant and alleging the following causes of action: (1) deprivation of clearly established constitutional rights (42 U.S.C. § 1983); (2) conspiracy (42 U.S.C. § 1983)' (3) *Monell*[4] liability (42 U.S.C. § 1983); (4) interference with contract; (5) interference with economic advantage); (6) intentional infliction of emotional distress; and (7) negligence.

On February 1, 2008, defendants filed a demurrer to plaintiff's first amended complaint and a special motion to strike the complaint under section 425.16. After a hearing on the demurrer and special motion to strike, the trial court issued an order stating: "The special motion to strike is granted as to the entirety of the fourth, fifth and sixth causes of action. With regard to the first, second, and third and seventh causes of action, the special motion to strike is granted as to the allegations therein regarding the May 5, 2006, letter from Police Chief Trimble to the [ABC] and as to any verbal communications and complaints by defendants to the [ABC]. Such communications are protected speech. See *Bradbury v. Superior Court* (1996) 49 Cal. App. 4th 1108, 1112, 1118-1119. Plaintiff has not demonstrated a probability that plaintiff will prevail on these claims. [¶] ... [¶] The demurrer of defendants Trimble and McFadden as to the first and second causes of action is overruled. [¶] The demurrer of the City of Benicia as to the

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[4] *Monell v. Department of Social Services* (1978) 436 U.S. 658 (*Monell*).

first, second and third causes of action (omitting allegations stricken by the special motion to strike) is sustained, with 30 days' leave to amend. A city may be sued for a violation of an official policy, but that policy has not been identified. *Monell* [, *supra,*] 436 U.S. [at p.] 69. [¶] The demurrer of the defendants as to the fourth, fifth and sixth causes of action is moot in that the special motion to strike them was granted. [¶] There was no demurrer to the seventh cause of action[5]

DISCUSSION

Section 425.16, commonly known as the anti-SLAPP (strategic lawsuit against public participation) statute, provides: "The Legislature finds and declare that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled

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[5] The portion of the order relating to the demurrer is not appealable and we therefore nol not review the trial court's order as it relates to the demurrer. (*Sizemore v. Master Financial, Inc.* (2007) 151 Cal. App. 4th 1386, 1396 '["An order sustaining a demurrer without leave to amend is not appealable, and an appeal is proper only after entry of a dismissal on such an order"]; *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal. 4th 893, 912-913 an order overruling a demurrer is not immediately appealable].

through abuse of the judicial process. To this end, this section shall be construed broadly." (§ 426,16, subd. (d).) "A cause of action against a person arising from any act of that person in furtherance of that person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.15, subd. (b)(1).)

Consistent with the statutory language, courts apply a two-prong test when ruling on a special motion to strike. First, the moving defendant must make a prima facie showing that the acts that are the subject of the plaintiff's claims were performed in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 67, § 425.16, subd. (b).) A defendant that satisfies its initial burden of demonstrating the targeted action is one arising from protected activity faces no additional requirement of demonstrating that the action actually has had a chilling effect on the exercise of its rights. (*City of Cotati v. Cashman* (2002) 29 Cal.. 4th 69, 75-76 (*Cotati*).)

Once the moving defendant makes this requisite showing, the burden shifts to the plaintiff to establish, based on competent and admissible evidence, a probability of prevailing on the merits of the plaintiff's claims. (*College Hospital Inc. v.*

Superior Court (1994) 8 Cal. 4th 704, 718-719.) To establish a probability of prevailing on the merits, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts sufficient to support a favorable judgment if the evidence submitted by the plaintiff is credited. (*Navellier v. Sletten* (2002) 29 Cal. 4th 82, 88-89, 93.) On appeal, we review a trial court's ruling on a special motion to strike de novo. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal. App. 4th 90, 103.)

Applicability of Anti-SLAPP Statute

As stated, a cause of action is subject to a motion to strike under the anti-SLAPP statute if it arises "from any act of [a] person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" unless the plaintiff establishes a probability of prevailing on the claim. (§ 425.16, subd. (b)(1).) acts "in furtherance of [a] person's right of petition or free speech" include: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in

connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue of public interest." (§ 425./16, subds. (b)(1), (e).)

The anti-SLAPP statute protects *all* petition-related activity before a governmental body as long as the statement or conduct are made "in connection with an issue under consideration," regardless of whether the statements involve a public issue: "[A]ll that matters is that the First Amendment activity take place in an official proceedings or be made in connection with an issue being reviewed by an official proceeding." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1116, 1122-1123 (*Briggs*) [bright line test applies[; *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387, 1395.) This is because "[a]ny matter pending before an official proceeding possesses some measure of 'public significance' owing solely to the public nature of the proceeding, and free discussion of such matters furthers effective exercise of the petition rights section 425.16 was intended to protect." (*Briggs, supra,* 19 Cal. 4th at p. 1118.)

Here, Trimble wrote to the ABC, a governmental body, in response to the ABC's notice of a proposed change in ownership of JSM's liquor license.[6] The latter contained information relevant

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[6] Business and Professions Code section 23987 requires ABC to send a copy of all applications for transfers of liquor

to the transfer of the liquor license, i.e., a list of restrictions to be imposed uder new ownership "[d]ue to the frequent number of calls for service to this business over the last few years ...." Because the letter was a "writing made in connection with an issue under consideration" (§ 426.16, subd. (e)(2)) by a governmental body, the trial court properly determined the anti-SLAPP statute applied to allegations in the first, second, third and seventh causes of action relating to the "May 5, 2006, letter from [Trimble] to [the ABC], and ... to any verbal communications and complaints by defendants to [the ABC]."

The trial court, however, erred in striking only certain allegations in the first, second, third and seventh causes of action because an anti-SLAPP motion challenges a *cause of action,* rather than individual allegations or theories supporting the cause of action. (§ 425.16, subd. (b)(1) [a "cause of action" is subject to an anti-SLAPP motion].) Thus, where a single cause of action alleges both acts protected under the statute and non-protected acts, the entire cause of action may be stricken under section 425.16. (*Fox Searchlight Pictures, Inc.. v. Paladino* (2001) 89 Cal. App. 4th 294, 308.) A plaintiff "cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action'" (*Ibid.*, fn. Omitted.) The applicable test is

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licenses to various public officials, including the chief of police.

whether the allegations referring to arguably unprotected activity are only incidental or collateral to a cause of action based essentially on protected activity, and we must therefore examine the principal thrust or predominant nature of the cause of action to determine applicability of the anti-SLAPP statutory scheme. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal. App. 4th 181, 188; *Cotati, supra,* 29 Cal. 4th at pp. 78-79.)

Plaintiff argues "the suit is based upon the continuous pattern of harassment by the defendants and repeated violations of plaintiff's civil rights," and that Trimble's letter is "merely *evidence* of Defendant's retaliation for exercise of his First Amendment rights." (Emphasis in original.) He relies on *Cotati, supra,* 29 Cal. 4th 69, for the proposition that "the mere fact an action was filed after protected activity took place does not mean it arose from that activity." (29 Cal. 4th at pp. 76-77.) As set forth below, however, defendants' communication with the ABC constitute the gravamen of each of the causes of action.

In his first cause of action, plaintiff alleges defendants violated his "right to be free from retaliation for the lawful exercise of [his] right to petition governmental officials for redress of grievances, as guaranteed by the First Amendment" when they "submitted undue restrictions upon his business hours" for plaintiff's public "complaints about [defendants'] repeated harassment of Plaintiff's patrons and his establishment also alleges defendants violated his "right not to be deprived of life or liberty without

due process of law, as guaranteed by the Fifth and Fourteenth Amendments" when they "deprived [him] pf the business goodwill of [JMS]" and the proceeds of the sale of JMS by "engag[ing] in a pattern of harassment of Plaintiff's establishment and its patrons" and "intentionally and unlawfully interfer[ing] with Plaintiff's contract to sell the bar by unduly restricting its business hours."

Although the cause of action here includes a generalized allegation of "repeated harassment" and "a pattern of harassment" of JMS and its patrons, the harassment is alleged only to explain why plaintiff complained about defendants, and why defendants in turn retaliated against him. The harassment is therefore only incidental to defendants' letter to the ABC, which resulted in "interfere[nce] with Plaintiff's contract to sell the bar" and caused the damages plaintiff seeks to recover. Moreover, in other sections of the complaint, which are incorporated by reference in this cause of action, plaintiff alleges he publicly complained about defendants (which in turn led defendants to retaliate against him) because defendants were, among other things, "making unfounded and defamatory complaints to [the ABC]." He also alleges he hired counsel specifically to challenge these "unfounded allegations." Thus, even the initial harassment that caused plaintiff to publicly complain about defendants was based in large part on protected activity. Because the first cause of action stems from defendants' communications with the ABC, the anti-SLAPP statute applies.

In the second cause of action for conspiracy, plaintiff alleges Trimble, McFadden, and "Does 1-100 made an agreement to violate Plaintiff's First and Fourteenth Amendment rights to be free from retaliation for his exercise of his right to publicly criticize Defendants for their continuous pattern of harassment, to petition the government for redress of grievances, and from seizure of his liberty and property interests without due process *when they fabricated allegations of violations of the laws under the [ABC] statutes and ordered undue restrictions upon Plaintiff's right to operate his bar.*. As an overt act in the furtherance of the conspiracy, Defendant Trimble and Does 1-100 deliberately *disseminated a letter on May 5, 2006, to the ABC [ABC Board] requesting that undue restrictions be placed on [JMS]."* (Emphasis added.) As emphasized, this cause of action is based almost entirely on the protected activity of defendants' communications to the ABC, specifically, their acts of reporting "violations of the laws under the [the ABC] statites" and sending a letter imposing restrictions on JMS under new ownership. Thus, the anti-SLAPP statute applies to the second cause of action.

In this third cause of action, plaintiff alleges the City, Trimble and Does 1 through 100 "have been given notice on repeated occasions of a pattern of ongoing constitutional violations and practices ... constituting the unlawful surveillance of the patrons of all bars in the City of Benicia, including [JMS], for the express purpose of unlawfully detaining them without reasonable suspicion or

probable cause ...." Although plaintiff alleges unlawful surveillance and harassment of bar patrons, his chief complaint is that defendants engaged in these acts "*in order to* ... particularly deprive Plaintiff of business goodwill and to fabricate claims against Plaintiff," i.e., to make false claims to the ABC to justify the imposition of brought in state court are not subject contract to sell JMS. (Emphasis added.) The fact that plaintiff also alleged nonprotected activity does not bring this action outside the scope of the anti-SLAPP statute.

In his seventh cause of action, plaintiff alleges Trimble, McFadden and Does 1 through 100 breached their duty "to avoid causing interference with Plaintiff's contact with his business relationship with [Kim], and to avoid causing distress to citizens in the exercise of their police function. Although the cause of action contains a generalized allegations that defendants breached their duty not to "distress to citizens", the gravamen is that defendants caused plaintiff harm by making false allegations to the ABC,thereby causing Kim to withdraw her offer to puchrase JMS. Thus, the anti-SLAPP statute applies to the seventh cause of action.

Plaintiff urges the anti-SLAPP statute nevertheless does not apply to his first, second, third and seventh causes of action because "federal civil rights claims brought in state court are not subject to anti-SLAPP protection because the statute provides absolute immunity over than above that afforded under federal law." The anti-

SLAPP statute, however, is not an immunity statute, but a procedural one that allows for early dismissal of meritless claims, including federal claims, that are based on protected activity. (See *Rusheen v. Cohen* (2006) 37 Cal. 4th 1048, 1055-1056 [the anti-SLAPP statute was enacted "to provide a *procedural* remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights"], emphasis added; *Ludwig v. Superior Court* (1995) 37 Cal. App. 4th 8, 21, [the anti-SLAPP statute "sets out a mere rule of procedure"].) As such, it has been applied to federal civil rights causes of action asserted in state court. (E.g. *Vergos v. McNeal, supra,* 146 Cal. App. 4th at p. 1390[7]; *Levy v. City of Santa Monica, supra,* 114 Cal. App. 4th at p. 1259; *Bradbury v. Superior Court, supra,* 49 Cal. App. 4th at p. 1118 (*Bradbury*) ["Where the action is founded on a federal statute and brought in a state court, state procedure controls unless the federal statute provides otherwise."])

Plaintiff relies primarily on *Pitts v. County of Kern* (1998) 17 Cal. 4th 340 (*Pitts*) in support of his position that the anti-SLAPP statute is an immunity statute that cannot be applied to federal civil rights claims. *Pitts,* however, is inapposite. There, defendants in a criminal case brought a federal civil rights action against the district attorney and the county, alleging they engaged in

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[7] Plaintiff argues *Vergos v. McNeal, surpa,* 146 Cal. App. 4th 1387 is "outdated", but does not explain why we should disregard the case, which was decided only three years ago.

misconduct during the criminal prosecution. (*Id.* at pp. 345-346.) In analyzing whether any absolute or qualified immunities applied to the district attorney's acts, the California Supreme Court noted, "The availability of immunity from liability under sction 1983 in state court is governed by federal, not state, law.") (*Id.* at p. 350, citing *Howlett v. Rose* (19990) 496 U.S. 356, 375._ The case was not an anti-SLAPP case and did not discuss the applicability of the anti-SLAPP statute to federal civil rights actions.

Plaintiff also argues the anti-SLAPP statute does not protect Trimble and McFadden because they are public officials who were acting in their official capacities as members of the police department. A public official or government body, however, just as any private litigant, qualifies as a "person" who can invoke the anti-SLAPP statute. (*Bradbury, supra,* 49 Cal. App. 4th at pp. 1111, 1113-1114 [federal civil rights claims against a county and district attorney for constitutionally protected activities were subject to a special motion to strike under the anti-SLAPP statute]; see also *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Assn. of Governments* (2008) 167 Cal. Appl. 4th 1129, 1237 [a complaint charging a public agency with misuse of public funds in promoting a ballot measure]; *Holbrook v. City of Santa Monica* (2006) 144 Cal. App. 4th 1242, 1245-1246 [a complaint challenging the validity of regulations governing city council meetings].) In rejecting the plaintiff's argument that the anti-SLAPP statute does not

apply to government officials, *Bradbury* stated, "The exchange of ideas would be unduly curtailed if a governmental entity and its representatives could not freely express themselves on matters of public interest." (49 Cal. App. 4th at p. 1118)

Plaintiff argues that *Bradbury, supra,* 49 Cal. App. 4th 11108l, on which the trial court also relied in determining that the anti-SLAPP statute applied to Trimble and McFadden, is "outdated" because it "was decided ... nine years before *Garcetti v Ceballos* (2005) 547 U.S. 410 [(*Garcetti*)]." *Garcetti,* however, did not overrule *Bradbury.* In *Garcetti, supra,* 547 U.S. at pages 414-415, a deputy district attorney filed a complaint against the county and his supervisors alleging they retaliated against himn for issuing a memorandum stating that an affidavit the prosecution was using to obtain a critical search warrant contained serious misrepresentations. The issue in the case was "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties." (*Id.* at p. 413) The United Supreme Court (*sic*) held, "[W]hen public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." (*Id.* at p. 421) In so holding, the Court stated that employers must be give "sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity.

Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." (*Id.* at pp. 422-423). The case did not involve the anti-SLAPP statue and does not support plaintiff's position that Trimble's letter to the ABC is not protected speech for purposes of the anti-SLAPP statute.

PROBABILITY OF PREVAILING

Because defendants have met their burden of showing the anti-SLAPP statute applies to the first, second, third and seventh causes of action, the burden shifts to plaintiff to establish a probability of prevailing on those causes of action.)*College Hospital Inc. v. Superior Court, supra,* 8 Cal. 4th at pp. 718-719.) To meet this burden, a plaintiff must ""demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a fabvorable judgment if the evidence submitted by the plaintiff is credited." [Citation] "The burden on the plaintiff is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment."' [Citation] The showing must be made through 'competent and admissible evidence.' [Citations.] Thus, declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded. [Citation]" (*Gilbert v. Sykes*

(2007) 147 Cal. App. 4th 13, 26.) "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submission s of both the plaintiff and the defendant (§ 426.15, subd. (b)(2))); though the court does not *weigh* the credibility or comparative probative strength of competeing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [Citation.]" (*Gilbert v. Sykes, supra,* 147 Cal. App 4th at pp. 26-27.)

In opposition to defendants; demurrer and special motion to strike, plaintiff submitted a declaration by his attorney, Daniel J. Russo, who stated his belief that Trimble directed a "campaign of harassment ... at ... [JMS]" and "stepped up" the harassment each time plaintiff attempted to address the harassment. He declared the harassment included such acts as "parking in his parking lot, entering the bar, stopping bar patrons who were not intoxicated and taking down license plates of patrons who had committed no crime," and state he "personally observed Benicia police officers either parked in the parking lot sitting in their patrol cars or sitting in their care across the street." Russo further declared that plaintiff tried to sell JMS but that "[t]he sale was actively sabotaged by [Trimble] when he sent a letter to the ABC stating that restrictions would be imposed on the business. [¶] ... [¶] ....As a direct result of that letter, the buyer for the business backed out of the signed contract." Russo declared that defendants

explained they were responding to complaints by neighbors, but hat when Russo hired a private investigator to "canvass the neighborhood about any complaint," the investigator produced reports that "indicated" there had been no complaints. Russo forwarded the investigator's report to the ABC and the City.

Defendants submitted declarations by Trimble and McFadden in support of their demurrer and special motion to strike. Trimble and McFadden declared they performed all administrative inspections of JMS and detentions of JMS patrons in their official capacities as chief of police (Trimble) and as a police officer (McFadden) because they believed the inspections and detentions were reasonable. Trimble further declared, "The business license restrictions that I proposed be placed on JAMS, as stated in a lewtter I sent to the ABC dated May 5, 2006, were proposed in the execution of my official duties. I suggested the proposed business license restrictions because I felt those restrictions were reasonable and appropriate for me to recommend as the Chief of Police for the City of Benicia, given the frequent, long-standing and repetitive problems experienced with JMS." Trimble declared he did not think his actions would cause Kim to withdraw her offer to purchase JMS. McFadden declared he did not know "until after Plaintiff filed this current lawsuit, that James Trimble or any other police officer for the City of Benicia, had made any statements, complaints or writings, to the ABC about Plaintiff's liquor license, JMS, or the transfer of the liquor

license, or that Trimble or any other police officer fo the City of Benicia had proposed restrictions to the ABC to be placed on Plaintiff's liquor license or the application to transfer Plaintiff's liquor license." He declared he never made an agreement with Trimble or conspired with him to deprive plaintiff of his constitutional rights or cause a breach of a purchase agreement.

First cause of action – Retaliation

"A claim for retaliation for engaging in protected speech under the First Amendment requires proof that (1) the person was subjected to an adverse action; /(2) the person had engaged in speech that was constitutionally protected because it touched on a matter of public concer; and (3) the protected speech was a substantial motivating factor for the adverse action. [Citation.]" (*Lachtman v. Regents of University of California* (2007) 158 Cal. App. 4th 187, 214.)

We do not address the first two elements of plaintiff's retaliation claim because we conclude there is insufficient evidence to show that plaintiff's complaint about the harassment was defendant's substantial motivating factor for imposing restrictions on JMS. As noted, Trimble made his recommendation in respone to a notice he received from the ABC pursuant to Business and Professions Code section 34987, which requires the ABC to send a copy of all applications for transfers of liquor licenses to various public officials, including the chief of police . Trimble stated in his

letter to the ABC that restrictions were to be imposed "[d]ue to the frequent number of calls for service to this business over the last few years." He later declared under penalty of perjury in a declaration submitted to the trial court that the restrictions were necessary to to the "the frequent, long-standing and repetitive problems experienced with JMS."[8] There is no evidence in the record disputing Trimble's statement of "frequent, long-standing and repetitive problems experienced with JMS." That plaintiff's hired investigator "canvass[ed] the neighborhood" and did not learn of any specific complaints by neighbors does not show that Trimble's statement is untrue. Plaintiff has not me this burden of showing a probability of prevailing on his claim that defendants violated his rights under the First Amendment.

Due Process

Preliminarily, we note that plaintiff's due process claim under the Fifth Amendment fails as a matter of law because the due process clause of the Fifth Amendment applies "only to actions of the federal government – not to those of state or local governments." (*Lee v. City of Los Angeles* (9th Cir. 2001) 250 F,3rd 668, 687, citing *Schweiker v. Wilson* (1981) 450 U.S. 221, 227.) Plaintiff does not allege that any of the defendants are federal actors.

[8] We deny defendants' request for judicial notice of documents that were not presented to the trial court and purport to show there were "long standing ... problems experienced with JMS."

Accordingly, he cannot meet his burden of showing a probability of prevailing on his due process claim under the Fifth Amendment.

To prevail on a due process claim under the Fourteenth Amendment, a plaintiff m ust prove three elements: (1) a property interest protected by the Constitution; (2) deprivation of an interest by the government; and (3) lack of required process. (U.S. Const. Amend. XIV, § 1.) Plaintiff asserts: "[Plaintiff] alleges in his complaint that Trimble's interference with his existing contract deprived him the use of a property interest. Plaintiff also alleges damage to his business goodwill as a result of [defendants'] acts of repeated harassment of Plaintiff's patrons without legal justification or excuse ... [¶] The facts as alleged in the complaint provide more than ample evidence that Trimble and Does one through 200 deprived Plaintiff of the clearly established rights of substantive and procedural due process when Trimble sent the retaliatory letter to the ABC to cancel the sale of his bar." The above statements, however, are mere *allegations*; they are not admissible *evidence*, and therefore cannot br used to demonstrate a probability of prevailing. In any event, "[d]amage to business reputation without more does not rise to the level of a constitutionally protected property interest." (*WMX Technologies, Inc. v. Miller* (9th Cir.. 1996) 80 F.3rd 1315, 1319 [defamatory remarks made to the public injured the plaintiff's business reputation].) Moreover, the loss of a contract is recognized as the loss of property protected under the Fourteenth Amendment only "'

(1) the contract confers a protected status, such as those 'characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits;"; or (2) where "the contract itself includes a provision that the state entity can terminate the contract only for cause."" (*Benn v. County of Los Angeles* (2007) 150 Cal. App. 4th 478, 490, fn. Omitted.) Plaintiff's contract to sell JMS does not fall into either of these categories. Plaintiff has not met his burden f showing a probability of prevailing on this due process claim.

Second Cause of Action

A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'[" (*Rotermund v. United States Steel Corp.* (9th Cir. 1973) 474 F.2d 1139, 1145.) The requisite concurrence and knowledge may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators as well as other circumstances. (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal. 2d 305, 316.) However, "[a] reasonable inference ;" may not be bassed on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.'"

[Citation.] It must logically flow from other facts established in the action. [Citation.]" (*People v. Austin* (1994) 23 Cal. App. 4th 1596, 1604, disapproved on other grounds by *People v. Palmer* (2001) 24 Cal. 4th 856, 861.)

Plaintiff has not produced legally sufficient evidence showing Trimble and McFadden concurred in a tortuous scheme to injure him. Again, he relies only on the allegations in his complaint, which are not evidence, quoting from his complaint that Trimble and McFadden "made an agreement" to violate his rights. As noted, McFadden declared he was not aware of Trimble's letter to ABC until plaintiff filed his complaint. Although Trimble and McFadden both work for the Benicia Police Department, the record contains no evidence that any discussion or meeting took place between them, and no toerh facts from which an inference can be drawn that they worked together to violate plaintiff's rights. Plaintiff has not met his burden of showing a probability of prevailing on his second cause of action.

Third Cause of Action

A local government may be sued under title 42 U.S.C. section 1983 for a constitutional violation committed by its employees or agents if that violation is pursuant to the execution of an official policy or custom. (*Monell, supra,* 436 U.S. at pp. 690, 694.) To sustain a *Monell* action against a governmental entity, a plaintiff must show (1) he possessed a constitutional right of which he was

deprived; (2) the governmental entity had a policy that amounted to "deliberate indifference" to the plaintiff's constitutional right, and (3) an action pursuant to the policy caused a violation of that constitutional right. (See *id.* at p. 691; see also *City of Canton v. Harris* (1989) 489 U.S. 378, 389-391.) An official policy amounts to "deliberate indifference" to a plaintiff's constitutional rights when the need for more or different action is obvious, and the inadequacy of the current procedure is so likely to result in the violation of those rights that the policymakers can reasonably be said to have been deliberately indifferent to the need. (*City of Canton v. Harris, supra,* 489 U.S. at p. 390.)

In his third cause of action, plaintiff alleges the City had "an informal custom or policy which tolerates and promotes the continued deprivation of First, Fourth, Fifth and Fourteen (*sic*) Amendment rights and violation of civil rights of citizens by Benicia police officers." It appears his claim is that the City had a custom or policy of allowing its police officers to retaliate against individuals who complained of harassment. Because plaintiff has failed to show a probability of prevailing on his claims that defendants violated his constitutional rights, he also cannot show a probability of prevailing on a claim that the City was "deliberate[ly] indifferen[t]" to those violations. To the extent his cause of action is based on a violation of the Fourth Amendment, i.e., that police officers detained bar patrons without probable cause, plaintiff has no standing to assert a *Monell* cause of

action on behalf of bar patrons. Plaintiff has not shown a probability of prevailing on his third cause of action.

Seventh Cause of Action

To prove facts sufficient to support a finding of negligence, a plaintiff must show the defendant had a duty, breached the duty, and that the breach was the proximate or legal cause of the plaintiff's resulting injury. (*Munoz v. City of Union City* (23004) 120 Cal. App. 4th 1077, 1093.) Plaintiff's argument relating to this cause of acton essentially consists of repeating allegations from his complaint. He states, "In paragraph 50 of Plaintiff's [complaint], Plaintiff alleges more than ample facts that defendants owed Plaintiff a duty of care and that they breached that duty. At all times herein mentioned, 'defendants ... were subject to a duty of care, to avoid causing interference with Plaintiff's contract with his business relationship with [Kim], and to avoid causing distress to citizens in the exercise of their police function. The conduct of [Trimble and Does 1 through 100] ... did not comply with the standard of care to be exercised by reasonable police officers, nor did it comply with police department procedures ...." Plaintiff has not cited any evidence or legal authority to show a probability of prevailing on this cause of action.

In any event, plaintiff's cause of action fails as a matter of law. First, it is settled that California does not recognize a cause of action for negligent interference with a contract. (*Fifield Manor v.*

Finston (1960) 54 Cal. 2d 632, 636 ["courts have quite consistently refused to recognize a cause of action based on negligent, as opposed to intentional, conduct which interferes with the performance of a contract"].) Thus, plaintiff cannot prevail on his claim that defendants were negligent because they breached their duty to "avoid causing interference with Plaintiff's contract." Second, to the extent plaintiff asserts defendants also breached their duty to "avoid causing distress to citizens," plaintiff does not have standing to assert a claim ofr negligence on behalf of "citizens," generally. Plaintiff has not shown a probability of prevailing on this seventh cause of action.

Attorney Fees

The "prevailing defendant" on a special motion to strike under the anti-SLAPP statute "shall be entitled" to recover attorney fees and costs incurred in bringing the motion. (§ 425.16, subd. (c); *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal. App. 4th 1379, 1383 [the prevailing defendant is entitled to fees and costs incurred on the motion to strike, not the entire litigation].) The fee award is mandatory. (*JKetchum v. Moses* (2001) 24 Cal. 4th 1122, 1131 ["any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees"]. Here, the trial court did not grant defendants' request for attorney's fees and costs, presumably based on a finding that defendants were not the "prevailing" party on their special motion to strike. Because we

reverse the trial court's order only partially granting defendants' motion and conclude it should have been granted in its entirety, we also conclude that defendants are entitled to attorney's fees and costs incurred in bringing their motion. Defendants shall also be awarded their fees and costs on appeal. (*Evans v. Unbow* (1995) 38 Cal. App. 4th 1490, 1499 ["A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise"].)

DISPOSITION

The order partially granting defendants' special motion to strike as to plaintiff's first, second and third causes of action is reversed. The mtter is remanded with instructions to the trial court to grant the motion in its entirety and dismiss the action against defendants. The trial court shall award attorney fees and costs to defendants as the prevailing party on the motion to strike and on this appeal.

_____

McGuiness, P.J.

We concur:

_____

Siggins, J.

_____

Jenkins, J

Appendix Three

"Questions Presented" in State Review Petition

1. Whether civil rights causes of action under 42 U.S.C. § 1983 brought in state court against individuals acting in their official capacity are governed by CCP 425.16, California's Anti-Slapp statute.

2. Whether Respondent's first cause of action of violation of 42 U.S.C. § 1983 arises from California's Anti-Slapp statute.

3. Whether respondent's second cause of action for conspiracy is barred by California's Anti-Slapp Statute.

4. Whether Respondent's *Monell* claim is protected by Section 4225.16 because Chief Trimble, who was vested with final authority over the pattern of harassment of Respondent and his business was deliberately acting on behalf of the City of Benicia which knew of and ratified the informal custom of intentional harassment of Respondent.

5. Whether, because Trimble was acting in his official capacity under the color of authority, he may claim qualified immunity and not absolute immunity pursuant to Code of Civil Procedure 425.16 and the Appellate Court's ruling under the Anti-Slapp statute.